

Office of Chief Counsel
Internal Revenue Service

memorandum

CC: [REDACTED]: [REDACTED]: [REDACTED]: TL-N-5533-00
[REDACTED]

date:

to: Chief, Examination Division, [REDACTED] District
Attention: [REDACTED]
[REDACTED]

[REDACTED], Group Manager, Employment Tax
[REDACTED], Employment Tax Specialist
[REDACTED]

from: [REDACTED], Associate Area Counsel, LMSB
[REDACTED], Senior Attorney [REDACTED]

subject: Request for Pre-Review of Non-docketed Significant Advice

Taxpayers: (1) [REDACTED] (EIN: [REDACTED]),
(2) [REDACTED] (EIN: [REDACTED]),
(3) [REDACTED] (EIN: [REDACTED]),
and
(4) [REDACTED] (EIN: [REDACTED])
[REDACTED]

Issue: Executing Forms SS-10 and Forms 4016 for years prior to
[REDACTED]

Statute of Limitations: [REDACTED]

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The purpose of this memorandum is to modify and supplement our prior advice, dated December 5, 2000, in light of the fact that Exam has decided to secure individual Forms SS-10, "Consent to Extend the Time to Assess Employment Taxes," from the following four entities:

1. [REDACTED] (EIN: [REDACTED]);
2. [REDACTED] (EIN: [REDACTED]);
3. [REDACTED] (EIN: [REDACTED]); and
4. [REDACTED] (EIN: [REDACTED]).

Another purpose of this memorandum is to recommend that you obtain a transferee consent, Form 4016, "Consent Fixing Period of Limitation Upon Assessment of Employment or Miscellaneous Excise Taxes Against a Transferee," from the successor corporation for some of the foregoing entities.

Given the imminent expiration of the statute of limitations, we have assumed in drafting this memorandum that the statute of limitations for the assessment of employment taxes with respect to the foregoing entities has been validly extended through [REDACTED]. Furthermore, our advice herein is applicable for tax years prior to (but not including) the [REDACTED] year.¹

ISSUES

For each of the following entities, (a) how should the entity's name be captioned on the Form SS-10, and (b) whether a transferee consent should be obtained from the corporation into which the entity was merged:

1. [REDACTED] (EIN: [REDACTED]);
2. [REDACTED] (EIN: [REDACTED]);
3. [REDACTED] (EIN: [REDACTED]); and
4. [REDACTED] (EIN: [REDACTED]).

CONCLUSIONS

1. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

¹ We note that the Forms SS-10 to be secured from the parent corporations--i.e. [REDACTED] and [REDACTED]--should be captioned as we had recommended in our prior advice, dated December 5, 2000, for tax periods prior to [REDACTED].

[REDACTED], (EIN: [REDACTED]) (formerly known as [REDACTED])

b. No, you should not obtain a Form 4016 from [REDACTED], for the employment tax liabilities of [REDACTED], for years prior to [REDACTED]. [REDACTED], is not a transferee of [REDACTED]--it is the same corporation with a different name.

2. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED], (EIN: [REDACTED]) (formerly known as [REDACTED]), as successor in interest to [REDACTED], (EIN: [REDACTED]).

b. The Form 4016 should be obtained from [REDACTED], for the employment tax liabilities of [REDACTED], for years prior to [REDACTED].

In the space labeled "(Name)", you should insert: "[REDACTED] (EIN: [REDACTED]) (formerly known as [REDACTED]), as successor in interest to [REDACTED], (EIN: [REDACTED])"

On the line following the words "imposed against, or due from," you should insert: "[REDACTED], (EIN: [REDACTED])."

3. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED], (EIN: [REDACTED]).

b. The Form 4016 should not be obtained from [REDACTED], [REDACTED], is still in existence and has not been the subject of a reorganization.

4. [REDACTED]

a. The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED], (EIN: [REDACTED]), as

successor in interest to [REDACTED]
[REDACTED], (EIN: [REDACTED]).

b. The Form 4016 should be obtained from [REDACTED]
[REDACTED], for the employment tax liabilities of [REDACTED]
[REDACTED], for years prior to [REDACTED].

In the space labeled "(Name)", you should insert:
"[REDACTED], (EIN: [REDACTED]), as successor
in interest to [REDACTED], (EIN: [REDACTED])".

On the line following the words "imposed against, or due
from," you should insert: "[REDACTED],
(EIN: [REDACTED])".

The Forms SS-10 and 4016 may be signed by a duly authorized
officer of the respective entity, or an agent or attorney of such
entity who is specifically authorized to execute the form by a
power of attorney. Please double check all EINs and current
addresses.

FACTS

1. [REDACTED]

Prior to [REDACTED], all capital stock of [REDACTED]
[REDACTED], was owned by [REDACTED], a
Delaware corporation. See (unnumbered) first paragraph and
paragraph "A" of the preamble of the "Stock Purchase Agreement"
(attached hereto as Exhibit A) between [REDACTED]
[REDACTED], and [REDACTED], a Florida nonprofit
corporation.

On or about [REDACTED], [REDACTED]
[REDACTED], sold all of the issued and outstanding shares of the stock
of [REDACTED], to [REDACTED]. On
or about [REDACTED], [REDACTED], appears to
have changed its name to [REDACTED]. See Lexis and
INOLE printouts (attached hereto as Exhibits B and C).

2. [REDACTED]

On [REDACTED], [REDACTED], a Florida
corporation, was merged "with and into" [REDACTED]
[REDACTED], a Florida corporation, pursuant to Section 607.1105 of the
Florida Business Corporation Act. See "Articles of Merger" and
"Plan of Merger" (attached as Exhibit D). Upon the merger, the
separate corporate existence of [REDACTED],

ceased. The Plan of Merger provided, "The Surviving Corporation [REDACTED] shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations [REDACTED], and [REDACTED], all in the manner and with the effect set forth in Section 607.1106, Florida Statutes."

3. [REDACTED]

As noted above, it appears that [REDACTED], is still in existence as an active Florida corporation and has not been the subject of any reorganization. See Lexis printout (attached as Exhibit E).

4. [REDACTED]

Prior to [REDACTED], 100% of the stock of [REDACTED], was owned by [REDACTED]. See "Plan of Merger and Liquidation" and related attachments (attached as Exhibit F). On [REDACTED], [REDACTED], was merged with and into its parent corporation, [REDACTED]. See "Plan of Merger and Liquidation" and related attachments.

The "Plan of Merger and Liquidation" under which [REDACTED], was merged with and into [REDACTED], provides that

As a result of the Merger all rights of creditors and all liens upon any property of any of the Constituent Corporations shall be preserved unimpaired, and all debts, liabilities and duties of the Constituent Corporations shall be preserved unimpaired and the Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Section 1088 of the Oklahoma General Corporations Act.

DISCUSSION

I. Generally

As we noted in our prior memorandum, dated December 5, 2000, when state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891, 892 (3d Cir. 1929).

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

Florida law provides that when a merger takes effect:

(c) The surviving corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each corporation party to the merger;

(d) Any claim existing or action or proceeding pending by or against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation which ceased existence;

(e) Neither the rights of creditors nor any liens upon the property of any corporation party to the merger shall be impaired by such merger. . .

Fla. Stat. § 607.1106 (2000).

Oklahoma law provides that when a merger takes effect:

[F]or all purposes of the laws of this state the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated. . . . and all debts, liabilities and duties of the respective constituent corporations, from that time forward, shall attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

18 Okl. St. § 1088 (1999)

With respect to transferee liability, as we noted in our prior memorandum, dated December 8, 2000, the Service will attempt to assert that a successor is a transferee, as a last resort, when the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901 is still open. See GCM 34,970, at page 18, and CCDM 35.10.6.1 ("should the issuance of a new statutory notice be barred by the statute of limitations, it is advisable that the case be processed and handled as a transferee case").

Section 6901 does not create or define the existence of a transferee's liability, but affords the Commissioner a procedural remedy for collection of tax. Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part without published opinion and dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Gumm v. Commissioner, 93 T.C. 475, 479 (1989). Under I.R.C. § 6901(a)(2), assertion of transferee liability for employment taxes is allowed if the transferee liability arose on the liquidation of a partnership or corporation, or on a reorganization within the meaning of I.R.C. § 368(a).

II. Application of the Law

A. [REDACTED]

1. Forms SS-10

The corporate existence of [REDACTED], appears to have continued unaltered throughout the years at issue to the present. All of its stock was sold to [REDACTED], in [REDACTED] and then its name was changed to [REDACTED], in [REDACTED], but there is no available record of any corporate reorganization or dissolution.

2. Forms 4016

Because the corporation formerly known as [REDACTED], is still in existence and has not been reorganized and is the same corporation that incurred any relevant tax liability, assertion of transferee liability is unnecessary and not possible.

B. [REDACTED]

1. Form SS-10

The merger agreement, by which [REDACTED],

was merged into [REDACTED], provides that the surviving corporation shall be liable for "all liabilities and obligations of each of the Constituent Corporations [REDACTED], and [REDACTED], all in the manner and with the effect set forth in Section 607.1106, Florida Statutes." Section 607.1106, Florida Statutes provides that the surviving corporation shall be fully liable for the obligations of the merging corporations. Thus, according to Florida law and the terms of the merger agreement, [REDACTED], is primarily liable, as a successor in interest, for the employment taxes of [REDACTED]. Consequently, you should secure a Form SS-10 from [REDACTED], with respect to the employment tax liabilities of [REDACTED].

2. Form 4016

The Service could argue that [REDACTED], is a transferee at law by virtue of the contractual liability provided for in the merger agreement pursuant to which [REDACTED], merged into [REDACTED]. In addition to the contractual liability, I.R.C. § 6901(a)(2) provides for an assertion of transferee liability for employment taxes if the transferee liability arose pursuant to a I.R.C. § 368(a) reorganization. A statutory merger under Florida law would be a reorganization under I.R.C. § 368(a)(1)(A).²

Consequently, we recommend you secure a Form 4016 from [REDACTED], for the employment tax liabilities of [REDACTED].

C. [REDACTED]

1. Form SS-10

The Form SS-10 should be captioned as follows:

[REDACTED], (EIN: [REDACTED]).

2. Form 4016

Since we have no facts to indicate that this entity was merged or sold, there is no "transferee" from whom a Form 4016 could be obtained.

² We render no opinion as to whether the merger was, in fact, a valid reorganization under I.R.C. § 368(a).

D. [REDACTED]

The "Plan of Merger and Liquidation" and related attachments under which [REDACTED], was merged with [REDACTED] and into its parent corporation, [REDACTED], as well as section 1088 of the Oklahoma General Corporation Act, provide that the surviving corporation shall be liable for the debts and obligations of the corporations being merged. Thus, according to Oklahoma law and the terms of the merger agreement, [REDACTED], is primarily liable, as a successor in interest, for the employment taxes of [REDACTED]. Consequently, you should secure a Form SS-10 from [REDACTED], with respect to the employment tax liabilities of [REDACTED].

2. Form 4016

The Service could argue that [REDACTED], is a transferee at law by virtue of the contractual liability provided for in the merger agreement pursuant to which [REDACTED], merged into [REDACTED].

In addition to the contractual liability, I.R.C. § 6901(a)(2) provides for an assertion of transferee liability for employment taxes if the transferee liability arose pursuant to a I.R.C. § 368(a) reorganization. A statutory merger under Oklahoma law would be a reorganization under I.R.C. § 368(a)(1)(A).³

Consequently, we recommend you secure a Form 4016 from [REDACTED], for the employment tax liabilities of [REDACTED].

If you have any questions, please contact [REDACTED] at [REDACTED] or [REDACTED] at [REDACTED].

Attachments:

Exhibit A: "Stock Purchase Agreement" between [REDACTED], and [REDACTED], a Florida nonprofit corporation.

Exhibit B: Lexis printout #1, indicating the filing of a name change for [REDACTED], formerly known as [REDACTED], on [REDACTED], and no [REDACTED].

³ We render no opinion as to whether the merger was, in fact, a valid reorganization under I.R.C. § 368(a).

reorganization after the [REDACTED], merger with [REDACTED]
[REDACTED]

Exhibit C: INOLE transcript, dated [REDACTED], for
EIN [REDACTED].

Exhibit D: "Articles of Merger" and "Plan of Merger" of
[REDACTED], and [REDACTED], filed
with the Florida Secretary of State on [REDACTED].

Exhibit E: Lexis printout #2, indicating that [REDACTED]
[REDACTED], is still an active Florida corporation.

Exhibit F: Plan of Merger and Liquidations of [REDACTED]
[REDACTED], and related documents.

Exhibit G: INOLE transcript dated [REDACTED], for
[REDACTED]

Exhibit H: INOLE transcript dated [REDACTED], for
[REDACTED]

Exhibit I: ENMOD transcript dated [REDACTED] for
[REDACTED]